No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

THE STATE OF TEXAS,
Petitioner,

vs.

RONALD CURTIS CHAMBERS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

RESPECTFULLY SUBMITTED,

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May 10, 1990

QUESTIONS PRESENTED

The Respondent does **not** accept the Petitioner's formulation of the question presented in the instant case. Respondent believes that this case actualy presents the following questions:

1. Can the requirement of *Batson v. Kentucky* that a *prima facie* case of purposeful racial discrimination in the exercise of peremptory strikes by the State be rebutted by the testimony of a prosecutor to the effect that he cannot recall why he exercised the strike, however, he has in other cases has a racially neutral excuse for striking members of the accused's race and that it is his habit not to exercise strikes for racial motivations?

2. Assuming that the first question is answered "yes", will that testimony suffice to rebut a *prima facie* case of purposeful racial discrimination in the exercise of peremptory strikes by the State when the prosecutor **neither conducted the** *vior dire* **of the jurors at issue nor in fact exercised the strikes at issue**? Will the habits on one prosecutor suffice to answer why **another** prosecutor struck a member of the accused's race or must the prosecutor who actually engaged in the racially discriminatory conduct explain his own actions?

3. Should the Court abandon the standards accounced in *Batson v. Kentucky* that the question of whether the State had rebutted a *prima facie* case of purposeful racial discrimination in the exercise of peremptory strikes by the State is a **question of fact** for the trial judge to resolve and substitute in its place a class of "excuses" which will, **as a matter of law**, always rebut the defendant's *prima facie* case of racially discriminatory exercise of peremptory challenges?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Ronald Curtis Chambers, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Texas Court of Criminal Appeals opinion in this case. That opinion is not yet reported, and appears in the Petitioner's Appendix as "Appendix A".

JURISDICTION

The Respondent does not dispute the jurisdictional statement contained in the petition.

The Respondent would, however, note that whether the State has successfully rebutted a *prima facie* case of racially discriminatory application of peremptory challenges

has been determined to be a **question of fact** for the trial court to resolve. *Batson v. Kentucky*, infra at 476 U.S. 98 and fn. 21. In this case, the trial judge found **as a matter of fact** that "[A]fter considering all of the evidence admitted at the hearing, and after evaluating the credibility of the witness and giving due weight to the evidence proffered by the State, the Court was, and still is, of the opinion that the State has failed to meet the 'clear and reasonably specific" criteria constitutionally necessary to rebut the Appellant's *prima facie* case of racially discriminatory exercise of peremptory strikes." Trial Court's Findings of Fact, Appendix A-8 of Petitioner's Petition. This **fact finding** was reviewed by the Texas Court of Criminal Appeals and was found to be supported in the appellate record. Appendix A-2, Petitioner's Petition.

Traditionally this Honorable Court will not exercise its jurisdiction merely to review a decision of a state court upon a question of fact. See: *Grayson v. Harris*, 267 U.S. 352, 358 (1952); *Portland Ry. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 600 (1962). In order to grant the relief that the Petitioner requests, this Honorable Court will of necessity have to reexamine the state court's findings and conclusions of fact which are supported in the record. For this reason, the Respondent respectfully prays that the Court decline jurisdiction of this case.

STATEMENT OF THE CASE

The Respondent expressly objects to the Statement of the Case contained in the Petitioner's Petition for Writ of Certiorari. Respondent believes that the Petitioner's Statement contains material misrepresentations of fact, omits critical facts and includes argument which is unsupported in law and/or the appellate record.

The Respondent, Ronald Curtis Chambers, was charged by indictment with the offense of capital murder. In a jury trial beginning November 6, 1985, the Respondent entered a plea of not guilty to the allegations contained in the indictment charging him with the offense of murder during the course of a robbery. At the conclusion of the guilt/innocence phase of the trial, the Respondent was found guilty and the trial proceeded to the punishment phase. At the conclusion of the punishment phase of the trial, the jury found both of the special issues submitted to it "yes", and, pursuant to Texas law, the Respondent was sentenced to death.

The sufficiency of the evidence to support the verdict is not relevant to the issues presented in the instant Petition. The Respondent will accept the recitation of the trial evidence found at pages four and five of the Petitioner's Petition for Writ of Certiorari as being substantially correct.

In order to fully understand the issues raised by Respondent on appeal and challenged by Petitioner in this Application for Writ of Certiorari, a brief recitation of the facts concerning the jury selection process is necessary.

A special venire was issued to summon potential jurors for the trial of this cause pursuant to the provisions of TEX. CODE CRIM. PROC. ANN. art. 34.01 *et. seq.* (1965). After the veniremen were called and the general excuses and exemptions were resolved by the trial judge pursuant to TEX. CODE CRIM. PROC. ANN. arts. 35.03 & 35.04 (1965), individual *voir dire* of the remaining jurors was conducted pursuant to TEX. CODE CRIM. PROC. ANN. art. 35.17 (2) (1965). (R.II 1-125, R.III- 1-92, R.VI- 11). Prior to the beginning of the individual *voir dire*, it was agreed that the race of the individual jurors would be reflected in the appellate record by having the court reporter note on the record the race of the potential juror. (R.IV- 4-6).

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During the course of the *voir dire*, sixteen (16) black potential jurors were called for consideration. Of these, eleven (11) were excused upon a challenge for cause by the State pursuant to TEX. CODE CRIM. PROC. ANN. art. 35.16 (1965). (R.IV- 42, 44; R.VI- 62, 98; R.VII- 92, 99-100; R. XIV- 8; R.XVIII- 181; R.XXI- 93; R.XXII- 16; R.XV- 46; R.XV- 79; R.XVI- 109; R. XVII- 231).

Of the remaining five potential black jurors, one, Mrs. Thelma Sanders Clardy, was excused by the parties by agreement (R.VI- 99-101). A second black potential juror, Ms. Ethel R. Tennell, was excused upon her claiming of a statutory exemption. (R.XV- 80). TEX. CODE CRIM. PROC. ANN. art. 35.04 (1965).

The remaining three (3) black potential jurors, Norrette Cereese Johnson, Loretta B. Rooks and Sandra A. Harrison, were all excused when the State exercised a peremptory challenge on each pursuant to TEX. CODE CRIM. PROC. ANN. arts. 35.15 *et. seq.* (1965). (R.VI- 28; R.IX- 68); R.XIV- 36). In the case of both Ms. Rooks and Ms. Harrison, the exercise of a peremptory followed the State's unsuccessful efforts to have the potential juror struck for cause. (R.IX- 53; R.XIV -24).

In each instance where the State exercised a peremptory challenge to excuse a black potential juror, the Respondent objected to the use of a peremptory strike to excuse the juror, asked that the prosecutor be examined on the issue of use of peremptory strikes to excuse black jurors, and, as a proffer to justify the request to be allowed to examine the prosecutor on the exercise of the strike, advised the trial court that if permitted to question the prosecutor, the Respondent believed that he could establish that the veniremen were stricken due to their race. (R.VI- 38-39; R.IX- 68-68; R.XIV- 36-37). The trail judge refused to permit the prosecutor to be examined on this issue. The Appellant's proffers that he expected the examinations to establish that the strikes

were racially motivated were not challenged by the State.

Between the State's challenges for cause and its exercise of peremptory challenges, the Respondent, a black man, was tried by an all white jury for the killing of a white man.

In the subsequent direct appeal, the Respondent challenged the prosecutors' exercise of peremptory challenges against the three black potential jurors on the basis of this Honorable Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). [1.]

On direct appeal, it was Respondent's stated position that no remand for a *Batson* hearing was necessary as, under Texas law, since the State failed to contradict the Respondent's proffer that the State's use of its peremptory strikes was racially motivated, the Respondent was entitled to relief as a matter of law. This proffer was never denied or modified or contradicted in any manner, and, thus, should be binding on the

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1. Respondent recognizes that the Supreme Court's decision in *Batson* was handed down April 30, 1986, some four months after the trial of this cause. This Court has, however, subsequently held that the decision in *Batson* shall be applied retroactively to those cases which were pending on direct appeal on the date that the decision was rendered. See: *Griffith v. Kentucky*, 479 U.S. 314 (1987). The instant case falls within these guidelines making the decision of the Court in *Batson* fully applicable in this case. Assuming, arguendo, that *Batson* were not applicable to this case, the Respondent would nevertheless be entitled to a reversal of his conviction as his uncontradicted proffer established that the exclusions at issue were racially motivated bringing him within the dictates of *Swain v. Alabama*, 380 U.S. 202 (1965).

State and under Texas law, should have been binding on the reviewing court.[2.]

The Respondent argued that in this case, the State had a full opportunity to explain why they struck all possible black jurors. When the Respondent sought to elicit testimony to establish that the strikes were racially motivated, the State refused to provide that testimony. When the Respondent advised the Court that he expected the evidence would show that the strikes were racially motivated, the State failed to deny or contradict this allegation. Even under the long standing holding of *Swain* the Respondent had established an uncontradicted *prima facie* case that the State had excluded the aforesaid black veniremen for racial reasons, thus the State may not plead that it should be permitted a second opportunity to explain its actions based upon the Supreme Court's holding in *Batson*. The State chose to stay silent at trial and should not be permitted to avoid the results of that choice by being permitted to attempt to justify

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2. See: *Stewart v. State*, 686 S.W.2d 118, 122 (Tex. Crim. App. 1984) (an offer by counsel of a statement concerning what the excluded evidence would have been had the testimony been admitted preserves exclusion for appellate review); *Johnson v. State*, 527 S.W.2d 525 (Tex. Crim. App. 1975) (defendant must proffer evidence when it becomes relevant to preserve for appellate review). *See:* TEX. CODE CRIM. PROC. ANN. art. 36.20 (1965) (since repealed); TEX. R. APP. PRO. 52 (1986); *Evans v. State*, 622 S.W.2d 866, 868 (Tex. Crim. App. 1981) (appellate court bound by the record on appeal as presented to it); *Williams v. State*, 485 S.W.2d 274 (Tex. Crim. App. 1972) (matters not supported by appellate record may not provide a basis for making any appellate decision); *Farris v. State*, 712 S.W.2d 512 (Tex. Crim. App. 1986) (party may not supplement an appellate record by adding new testimony not educed at original trial).

s actions at this late date. The Texas Court of Criminal Appeals did not address this rgument, rather it remanded the case to the trial court for a retrospective *Batson* earing.

On March 3, 1988, the retired state district judge who presided over the jury selection process in Respondent's trial conducted the retrospective *Batson* hearing ordered by the Texas Court of Criminal Appeals. The judge took judicial notice of the events which transpired during the original *voir dire*, including the fact that the State exercised its peremptory strikes to exclude all members of the accused's race from the jury who were not successfully challenged for cause by the State; it exercised a disproportionate percentage of its strikes to exclude members of the accused's race from the jury; its *voir dire* questions of members of the accused's race were in no way distinctive, nor did they elicit any information which would, on its face, justify the use of a peremptory challenge on the jurors; much of the questioning of black jurors was perfunctory and not designed to elicit any information which would justify using a peremptory strike; the State sought to challenge blacks for cause on frivolous grounds, and when those were rejected by the court, the State exercised a peremptory challenge to exclude the black jurors; as a result of the prosecutor's exercise of the State's peremptory challenges, members of the Respondent's race were substantially underrepresented on his jury; the State exercised peremptory challenges on blacks who, by their answers during *voir dire* appeared to be strong law enforcement advocates and pro-State. Based upon these facts, the trial judge determined that the Respondent had established a *prima facie* case of purposeful racial discrimination by the State in its exercise of peremptory challenges. The State does not now challenge this finding.

In an effort to rebut the Respondent's *prima facie* case of discriminatory exercise of peremptory challenges, the State called one of the two prosecutors who conducted part

of the *voir dire* in this cause, Paul Macaluso. Mr. Macaluso expressly stated that due to the passage of time since the trial of this cause, he could not remember these jurors, and more specifically, he could not recall why he exercised peremptory strikes to eliminate these black jurors from the Respondent's jury. (Tr.-45, 51, 59, 71, 80-81, 87-88, 94-95, 96, 125-128).

Mr. Macaluso did indicate that he had never stricken a potential juror solely on the basis of race, (Tr.- 51, 67, 78); however, this Honorable Court specifically rejected such an "excuse" as an adequate basis for finding that the accused's *prima facie* case of discrimination had been rebutted, holding that the prosecutor could not rebut a *prima facie* case "merely by denying that he had a discriminatory motive or affirming his good faith in individual selections." *Batson*, supra at 1723. Further, this prosecutor, Mr. Macaluso, did not exercise all of the strikes at issue, although he did profess to have "some input" into the decision to strike the juror. See, e.g.: (Tr.- 90-93) and where Mr. Beach, and not Mr. Macaluso, exercised the State's peremptory strike on jurors Rooks a Johnson. (R.VI- 28; R.IX- 68).

In attempting to justify their striking of the black jurors, the prosecutor testified that though he couldn't remember why he struck the jurors at issue, he had, prior to the hearing on March 3, 1988, reviewed the transcription of the *voir dire* proceedings regarding the three jurors stricken and their respective juror questionnaires. (Tr.- 33-34). He then testified, over objection, that in general he found certain answers in the *voir dire* and the juror questionnaires which were of such a nature as would, in most if not all cases, result in his striking similarly situated jurors in other cases.

It must be remembered that Mr. Macaluso did not testify from a refreshed recollection after reviewing the materials from the original trial. Though he reviewed the

naterials, they did not refresh his independent recollection, (Tr.-45, 51, 59, 71, 80-1, 87-88, 94-95, 96, 125-128); he was not speaking from memory thus revived. He had no ersonal knowledge concerning anything which happened at the trial at issue and based is testimony entirely on habit in other cases.

Even though inadmissible as a matter of Texas Evidentiary law, the prosecutor was permitted to testify concerning general matters of practice and procedure employed by him in exercising peremptory challenges in other cases. The proposed inference presumably is that if he struck jurors generally in other cases on the grounds related, he struck the instant jurors for similar non-racial reasons.

In addition, it was clearly established that Mr. Macaluso did not make two of the strikes at issue. Mr. Beach did. Mr. Macaluso had no knowledge as to why Mr. Beach exercised strikes, testifying only that he recalled that they discussed the strikes and that Mr. Macaluso had "some input" into the decision. He did not make the strikes at issue; he did not know why Mr. Beach made the strikes; he did discuss the decision and generally had some input into the decision, but could not testify as to Mr. Beach's thought processes or reasons for making two of the three strikes at issue. (Tr.- 7-8). There is, quite simply, no evidence as to why Mr. Beach exercised strikes in two of the three cases at issue.

After briefing by the parties and submission of proposed findings of fact and conclusions of law by both sides, the trial judge reconvened the proceedings on May 6, 1988, and announced rulings in favor of Respondent. The complete record, including findings of fact and conclusions of law was forwarded to the Texas Court of Criminal Appeals.

In a post submission brief, the State complained that based upon portions of the findings of fact and record which it found ambiguous, the Court could not be sure that the trial judge had given full consideration to the testimony of Mr. Macaluso. Essentially, the State argued that the trial judge had rejected the testimony out of hand and had not properly considered it.

On June 28, 1989, the Texas Court of Criminal Appeals delivered a *per curiam* opinion declaring that it could not be sure from the record that the trial judge had properly "considered" the proffered testimony, but expressly refusing to judge the weight or credibility of the witness' testimony, and remanded it to the trial judge to supplement his findings of fact to clarify whether he had considered the testimony in reaching the conclusions contained in the findings of fact filed with the Court.

On July 18, 1988, the trial judge filed new findings of fact and conclusions of law wherein he clarified his earlier findings by expressly stating that he had considered the testimony of the only State's witness. The findings of fact otherwise remained the same.

These findings were forwarded to the Texas Court of Criminal Appeals, and on October 25, 1989, that court adopted those findings in its opinion, finding that they were adequately supported in the appellate record. In that opinion, the Texas Court of Criminal Appeals reversed the Respondent's conviction and remanded the case to the trial court for a new trial. It is from this opinion of the Texas Court of Criminal Appeals that the State now seeks relief.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Criminal Appeals holding in this case has no particular importance to the interpretation of *Batson* and if left undisturbed, the holding will have no impact on the public's confidence in the criminal justice system.

In its first reason for granting this writ, the State suggests that the instant decision is a critical holding that will seriously erode the public's confidence in the criminal justice system. Any serious, impartial review of this case, or the cases handed down by the Texas appellate courts since this Honorable Court's decision is *Batson* will quickly dispel any such conclusion.

First, this case does not purport to provide any guidance or explanation of the *Batson* case. All this decision holds is that the unique findings of fact are adequately supported in the appellate record. The conclusions of law are each quotations from existing cases and break no new ground whatsoever. This case will have next to no precedential value and is clearly limited to the unique facts of this case.

Second, the State suggests that the Texas Courts have somehow fallen into *a* "morass" and are incapable of dealing with the *Batson* decision absent some additional guidance from this Honorable Court. Nothing could be further than the truth.

Since 1986, when the *Batson* case was handed down, the Texas courts have had numerous opportunities to address the application of that holding.

First, the various courts exercised their jurisdiction to abate numerous appeals and remand the cases to the trial court for retrospective *Batson* hearings such as were had in this case. See Appendix A.

After such hearings were had, a review of WESTLAW shows seventy-four (74) unpublished decisions and eight-nine (89) published decisions addressing the application of

Batson. Under Texas law, the appellate courts may only declare a case to be unpublished if the issues are clearly settled. TEX. R. APP. PROC. 90. The standards for publication dictate that an opinion by the court of appeals shall be published only if, in the judgment of the majority of the justices participating in the decision, it is one that "(1) establishes a new rule of law, alters or modifies and existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority."

Clearly, the shear volume of unpublished cases in Texas dealing with *Batson* issues establishes that the Texas courts do not believe that the issues presented are particularly difficult or deal with matters of continuing public interest.

Of the published opinions, seventy-nine (79) resulted in the appellate court determining that either the appellant failed to establish a *prima facie* case, or that prosecutor gave racially neutral explanations sufficiently related to the facts of the case to rebut the *prima facie case*. See Appendix B.

Not counting this case, there have been a total of ten (10) published cases where the prosecutor's explanation was found inadequate. In three cases, the prosecutor admitted that he had exercised a peremptory challenge on the accused because of the race of the juror: *Robinson v. State*, 756 S.W.2d 62 (Tex. App. - Texarkana, 1988) *no PDR*; *McKinney v. State*, 761 S.W.2d 549, 551 (Tex. App. - Corpus Christi, 1988) *no PDR*; *Speake v. State*, 740 S.W.2d 486 (Tex. App. - Hou[1st], 1997) *no PDR*.

In two cases, the appellate court simply noted that the trial court had filed findings of fact noting that the state's exercise of peremptory strikes on minorities was racially motivated, and that their review of the record showed that the findings

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were supported in the record of the *Batson* hearing: *Miller v. State*, 741 S.W.2d 501 (Tex. App. - Corpus Christi, 1987); *Witz v. State*, 749 S.W.2d 519, 520 (Tex. App. - Hou[14th], 1988) *no PDR*.

In another case, the State refused to give any reason for the exercise of their strikes after the appellant established a *prima facie* case: *Seubert v. State*, 749 S.W.2d 585 (Tex. App - Hou[1st] 1988.

The final group of cases were reversed when the prosecutor gave explanations that were not related to the facts of the case, there was a total lack of meaningful questioning by the prosecutor, there was disparate treatment of jurors (persons with the same or similar characteristics were not struck), there was disparate examination of the members of the venire (questions of a challenged juror so as to evoke a certain response without asking the same questions of other members of the venire), and explanations based upon assumed group traits not shown to apply to the challenged juror specifically: *Lewis v. State*, 775 S.W.2d 13, 15 (Tex. App. - Hou[14th], 1989) *PDR ref'd*; *Daniels v. State*, 768 S.W.2d 314 , 315 (Tex. App. - Tyler, 1988) *PDR ref'd*; *Lewis v. State*, 779 S.W.2d 449, 454 (Tex. App. - Tyler, 1989); *Hill v. State*, 775 S.W.2d 754 (Tex. App. - Dallas, 1989) *PDR ref'd*.

Clearly, the only way the State can loose a *Batson* argument is if it confesses error, refuses to answer at all, or makes an answer that is either totally refuted by the record or so vague and unconnected to the case as to constitute no answer at all.

The business of criminal justice in Texas has in no way been eroded by this case, nor by *Batson* itself. The Texas courts are more than up to the challenge of resolving these issues and have, in fact, done so with remarkable dispatch. No one is

"bewildered" by this holding or any other holding on *Batson* handed down by the Texas appellate courts.

2. The holding below is totally consistent with this Court's opinion in *Batson*.

In its second reason for review, the State suggests that the instant opinion is in conflict with this Honorable Court's holding in *Batson*. Again, a review of the proceedings below and the limited opinion in this case clearly establishes that the instant opinion is at total harmony with *Batson*.

In this case, the Respondent established a *prima facie* case of racial discrimination in the application of the State's peremptory challenges. In an effort to rebut that showing, the state called one of two prosecutors who represented the State at the *voir dire* proceedings in this case. He testified that he couldn't remember why he struck the one juror he struck. He further admitted that he didn't strike two of the black jurors at issue, another prosecutor did.

If *Batson* has any meaning at all, it must mean that "I don't remember" will not constitute a reasonably specific racially neutral explanation related to the facts of the case sufficient to justify a finding that a *prima facie* case has been rebutted. Surely some explanation is clearly required. The instant explanation is totally speculative, inferential and in no way related to this particular case.

Further, the one witness the State chose to call did not in fact strike two of the three jurors at issue! The witness that they did call had no independent knowledge as to why those jurors were stricken, and could only state that he had some "input" into the decision. Perhaps he didn't act for racially discriminatory reasons, but the record is silent as to the motivation of the prosecutor who in fact conducted the instant *voir dire* and who in fact exercised the peremptory strikes at issue.

This Honorable Court specifically stated that it intended the prosecutor to come rward "with a neutral explanation of his action" to rebut a *prima facie case.* *mphasis added) Batson*, supra at 100. Clearly, to rebut the Respondent's *prima cie* case with regards to jurors Rooks and Johnson, the prosecutor who onducted the *voir dire*, who made the decision to exercise the State's strike nd who actually made that strike, Mr. Beach, if available, is constitutionally required come forward and explain "his action". The record in this case affirmatively stablishes that Mr. Beach was available to testify.

It seem curious to suggest that in light of a requirement to explain why strikes ere used on members of the Respondent's race, the State would tenaciously hold to the osition that "I don't remember" and "I didn't do it" would suffice. Rather than ender the prosecutor's explanations futile, all this case does is state that where no easonable explanation is proffered, or where that explanation consists of "I don't emember", the State has failed to meet its burden. Such a holding is in total accord ith this Honorable Court's decision in *Batson*.

Further, even if one prosecutor could speak for the actions of another, then that rosecutor should have to explain why the first prosecutor struck the juror at issue. here was no such explanation here. All Mr. Macaluso stated was why he acted the way e did, not why Mr. Beach acted as Mr. Beach was shown to have acted. Mr. Macaluso stified concerning his prior actions in other cases, attempting to raise the ference that if he had acted in a racially neutral manner in striking blacks in her cases, he must have also acted in a racially neutral manner in this case, even ough he admitted that he could not in fact testify that such was the case.

Finally, the excuses proffered by Mr. Macaluso concerning his actions in other cases were not related to the facts of the case, there was a total lack of meaningful questioning by the prosecutor, there was disparate treatment of jurors (persons with the same or similar characteristics were not struck), there was disparate examination of the members of the venire (questions of a challenged juror so as to evoke a certain response without asking the same questions of other members of the venire), and explanations based upon assumed group traits not shown to apply to the challenged juror specifically. Even if the testimony was accepted at face value, it is of the nature that would fail to rebut the Respondent's *prima facie* case of racially discriminatory application of the State's peremptory challenges.

3. The meaning of the phrase "clear and reasonably specific" explanation, as that term applies to *Batson* has been extensively explained by the lower courts and no further explanation is required.

The State's suggestion that the term "clear and reasonably specific" explanations for the exercise of peremptory challenges has not been adequately addressed by the lower courts is unsupportable. As noted above, the Texas courts have had nearly 90 opportunities in published opinions to address this issue. Essentially, any explanation will suffice, unless that explanation constitutes an admission of racial motivation in making a strike or the explanation is totally refuted by the record, such as when the reason given is that the juror is too young, but similarly situated white jurors were not stricken.

The Texas courts have been extremely tolerant of the State's use of peremptory challenges to exclude members of the accused's race. Day in and day out, black men continue to be tried by all white juries. As long as the State makes even the slightest effort to justify its use of peremptory challenges on

non-racial grounds, the courts will accept that reason unless the excuse is clearly and demonstrably false.

The problem in this case is that the State simply couldn't, or wouldn't, explain why it struck three black jurors. The State wishes this Court to declare that "I can't remember" is a specific, racially neutral excuse related to the facts of the case. Such a conclusion is totally out of harmony with the clear holding in *Batson*, and would, if adopted, totally evicerate *Batson*.

4. The holding of the Texas Court of Criminal Appeals is in no way inconsistent with this Honorable Court's previous interpretations of any term in any case, including Title VII cases.

The argument advanced by the State in this reason for review assumes that the State in fact gave an explanation for the exercise of peremptory challenges on the remaining members of the Respondent's race. As previously noted, the State totally failed to make any explanatiCn as to why two jurors were stricken, and the only explanation as to the third juror was that in other cases the prosecutor had not stricken jurors for racial reasons.

In no instance has Respondent been able to find a Title VII case where "I don't remember" constituted a "clear and reasonably specific' explanation to justify racially discriminatory actions. The State cites to no such case. The State did not offer any legitimate reason for the strikes at issue, and the holding of the Texas Court of Criminal Appeals is in no way inconsistent with any holding of this Honorable Court.

5. The State failed to give any explanation as to why Prosecutor Beach struck two of the three black jurors in this case, and failed to give any reason why Prosecutor Macaluso struck the third black juror.

In its fifth reason for review, the State seeks to suggest that it gave an adequate

justification for striking the three black jurors and, therefore, the instant case should be reversed. This conclusion ignores the clear import of the trial testimony and the clear intention of this Honorable court to rely on the trial judge's determination of whether the excuses proffered meet the standards set out in *Batson*.

While the State gives lip service to the proposition that the trial judge is the sole arbiter of the testimony given, it then ignores the clear and unmistakable finding of fact by the trial judge that the State did not explain why Prosecutor Beach struck two jurors. Further, the State ignores the clear finding of fact that the excuses given by Prosecutor Macaluso were not sufficiently specific, or related to this case to rebut the Respondent's *prima facie* case of racially discriminatory use of peremptory challenges.

Further, the State totally ignores the fact that Prosecutor Macaluso could not remember this case in any particulars, and could not state why he struck the one juror he struck. All he could do was say that in other cases he had exercised strikes for specified reasons, and that he assumed that consistent with his habit, he had exercised the strike on Juror Harrison for similar reasons. He could not, or would not, affirmatively state under oath that in fact these reasons were why he struck Juror Harrison.

Further, although he professed to have some "input" into the decision of Prosecutor Beach to strike the other two jurors, he admitted that he didn't make the strike, couldn't say why Prosecutor Beach struck the jurors, and couldn't begin to testify as to the thought processes of Prosecutor Beach.

Prosecutor Beach was available at the hearing to testify, but the State chose not to

call him, raising the reasonable inference that his testimony would not support the State's efforts to rebut the Respondent's *prima facie* case.

At no time did Prosecutor Macaluso testify to any fact, only to habit. He expressly stated he had no independent memory of the events of the trial. His testimony was exclusively about what he did in other cases, not this one. When stripped of the State's hyperbole, the testimony was simply "I don't remember" coupled with, "well, I didn't do it any case that I can remember, so I must not have done it in this case either". To suggest that such vague, speculative, self-serving testimony will, as a matter of law, meet the State's burden of proof is to argue that no answer short of a judicial confession by the prosecutor will result in an accused having an opportunity to be tried by members of his own race.

In *Batson*, this Honorable Court held that whether the State had rebutted a *prima facie* case of racially discriminatory application of its peremptory challenges was a **matter of fact** for the trial judge to resolve. *Batson*, supra at 476 U.S. 98 and fn. 21. In this case, the trial judge found **as a matter of fact** that "[A]fter considering all of the evidence admitted at the hearing, and after evaluating the credibility of the witness and giving due weight to the evidence proffered by the State, the Court was, and still is, of the opinion that the State has failed to meet the 'clear and reasonably specific" criteria constitutionally necessary to rebut the Appellant's *prima facie* case of racially discriminatory exercise of peremptory strikes." Trial Court's Findings of Fact, Appendix A-8 of Petitioner's Petition. This **fact finding** was reviewed by the Texas Court of Criminal Appeals and was found to be supported in the appellate record. Appendix A-2, Petitioner's Petition.

What the State is in fact asking this Honorable Court to do is to abandon the

formulation that whether the State has managed to rebut the Respondent's *prima facie* case is a question of fact for the trial judge to resolve, and to substitute in its stead a class of answers that will, **as a matter of law**, always suffice to rebut the *prima facie* case. In essence, the State wants to take the trial judge out of the resolution of these types of cases and to permit it to list one of a category of answers that will in every case rebut the accused's showing of racially discriminatory application of peremptory strikes. As long as this is a matter of fact for the trial judge to resolve, there is at least an outside chance that the State will lose a *Batson* hearing. The State proposes a new standard that will ensure that it cannot lose.

6. There is no need for this Honorable Court to further address the issue of what constitutes "clear and reasonably specific" testimony as the lower courts have clearly and unambiguously resolved that issue.

The State argues that the trial judge refused to consider the testimony of Prosecutor Macaluso. This simply isn't true. The trial judge clearly stated in his second findings of fact and conclusions of law that he had considered this testimony. What he also considered was the fact that Prosecutor Macaluso did not in fact strike two of the three jurors at issue; that Prosecutor Macaluso had "some input" into the decision to strike these jurors but, in the final analysis, simply didn't conduct the *voir dire* at issue, didn't make the decision at issue nor did he in fact exercise the peremptory strike at issue. What the trial judge also considered was that the prosecutor who made the decision was present and available to testify as to his motivations and reasoning, but the State chose not to call him. The obvious inference from this failure is that the testimony would not have aided the State's case. Finally, the trial judge clearly considered the simple fact that one prosecutor cannot possible testify as to the thought processes or motivations of another prosecutor.

When stripped of the smoke and mirrors, the State is actually asking this Honorable Court to sanction the State's use of one prosecutor, who has no memory of the trial, to testify about his general practices, and from those practices, to infer that since he had not struck jurors for racial purposes in other cases, he also did not strike jurors in this case for racial purposes. Further, they are asking this Court to sanction calling one prosecutor to explain the acts and motives of another prosecutor, even though he readily admitted that he didn't know what the motivations were and couldn't even testify as to his own mental processes, let alone the mental processes of another prosecutor. The State simply couldn't rebut the Respondent's *prima facie* case of racially discriminatory exercise of peremptory challenges. There was no evidence available to them, probably due to the simple passage of time. The trial judge, viewing this testimony, rightly found that the evidence was so speculative and inferential that it simply couldn't be sufficient to rebut a *prima facie* case. Under the facts of this case, any other conclusion would have been absurd.

CONCLUSION

In Texas, black men are still tried by all white juries for crimes allegedly committed against white men. *Batson* didn't change that. In this one case, the trial judge, when viewing the testimony, concluded that the Respondent had made a *prima facie* case of racially discriminatory application of peremptory strikes to ensure that Ronald Curtis Chambers would be tried by an all white jury. The State does not now contest that conclusion. With that decision, the burden shifted to the State of Texas to establish by clear and reasonably specific testimony exactly why the State struck members of the Respondent's race. The trial judge, hearing the testimony, had the temerity to conclude that "I don't remember" simply would not suffice. The judge also noted that the prosecutor who did testify, didn't conduct the *voir dire*, nor did he actually exercise the peremptory strikes used to exclude two black jurors from the jury. There was, thus, NO evidence to explain the prosecutor's actions. The prosecutor was available to testify, but the State chose not to put him on the stand. Under the facts of this case, the trial judge simply refused to sanction such vague, speculative and inferential suppositions as the kind of clear and reasonably specific answers necessary to rebut a *prima facie* case of racial discrimination. The Texas Court of Criminal Appeals carefully reviewed the trial judge's findings, and recognizing this Honorable Court's decision that the trial judge's opinions should carry great weight, determined that his conclusions were totally supported in the record and that his conclusions of law were accurate statements of the controlling authority. Ronald Curtis Chambers thus became one of a very few inmates who would receive relief on the basis of this Honorable Court's decision in *Batson*.

If the "excuses" proffered herein are legally adequate, in light of this record, then the Equal Protection Clause of the United States Constitution has in truth become a "vain and illusory requirement", the precise result which this Honorable Court sought

to avoid with its holding in *Batson*. Any other interpretation would clearly eviscerate *Batson* and make it like the tale told by an idiot in Shakespeare's Macbeth: "full of sound and fury, signifying nothing." Macbeth, Wm. Shakespeare, Act V, Scene V, line 17. This Honorable Court should deny the State's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

CASES REMANDED FOR BATSON HERAINGS

Garza v. State,
725 S.W.2d 482 (Tex. App. - Corpus Christi, 1982)

Hardy v. State,
726 S.W.2d 158 (Tex. Crim. App. 1987)

Henry v. State,
729 S.W.2d 732 (Tex. Crim. App. 1987)

Cleveland v. State,
728 S.W.2d 490 (Tex. App. - Ft. Worth, 1987)
(Opinion on Motion for Rehearing),
remanded 730 S.W.2d 886 (Tex. App. - Ft. Worth, 1987)

Miller v. State,
682 S.W.2d 538 (Tex. Crim. App. 1984)
remanded 731 S.W.2d 563 (Tex. Crim. App. 1987)

Miller v. State,
733 S.W.2d 287 (Tex. App. - Corpus Christi, 1987)

DeBlanc v. State,
732 S.W.2d 640 (Tex. Crim. App. 1987)

Williams v. State,
736 S.W.2d 906 (Tex. App. - Corpus Christi, 1987)

Robinson v. State,
738 S.W.2d 673 (Tex. Crim. App. 1987)

Chambers v. State,
742 S.W.2d 695 (Tex. Crim. App. 1988)

Wiltz v. State,
746 S.W.2d 303 (Tex. App. - Hou[14th], 1988)

Lee v. State,
747 S.W.2d 57 (Tex. App. - Hou[1st], 1988)

MillerEl v. State,
748 S.W.2d 459 (Tex. Crim. App. 1988)

Keeton v. State,
724 S.W.2d 58 (Tex. Crim. App. 1987)

Williams v. State,
767 S.W.2d 872 (Tex. App. - Dallas, 1989)

Newsome v. State,
771 S.W.2d 620 (Tex. App. - Dallas, 1989)

Hawkins v. State,
783 S.W.2d 288 (Tex. App. - Dallas, 1989)

Dewberry v. State,
776 S.W.2d 589 (Tex. Crim. App. 1989)

APPENDIX B
CASES AFFIRMED ON BATSON ISSUES

Gardner v. State,
738 S.W.2d 541 (Tex. App. - Hou[1st], 1989)

Jones v. State,
781 S.W.2d 415 (Tex. App. - Hou[1st], 1989)

Price v. State,
782 S.W.2d 266 (Tex. App. - Beaumont, 1989)

Vargas v. State,
781 S.W.2d 356 (Tex. App. - Hou[1st], 1989)

Tims v. State,
779 S.W.2d 517 (Tex. App. - Beaumont, 1989)

Hinojosa v. State,
780 S.W.2d 299 (Tex. App. - Beaumont, 1989)
(reversed on other grounds, affirmed re: *Batson* issues)

Grimes v. State,
779 S.W.2d 124 (Tex. App. - Hou[1st], 1989)

Arnold v. State,
778 S.W.2d 172 (Tex. App. - Austin, 1989)

Campbell v. State,
775 S.W.2d 419 (Tex. App. Hou[14th], 1989)

Munson v. State,
774 S.W.2d 778 (Tex. App. - El Paso, 1989)

Branch v. State,
774 S.W.2d 781 (Tex. App. - El Paso, 1989)

Dennis v. State,
772 S.W.2d 525 (Tex. App. Beaumone, 1989)

Holman v. State,
772 S.W.2d 530 (Tex. App. - Beaumont, 1989)

Barnett v. State,
771 S.W.2d 654 (Tex. App. - Corpus Christi, 1989)

Ortiz v. State,
773 S.W.2d 941 (Tex. App. - San Antonio, 1989)

Perry v. State,
770 S.W.2d 950 (Tex. App. - Ft. Worth, 1989)

Allen v. State,
769 S.W.2d 563 (Tex. Crim. App. 1989)

Brown v. State,
769 S.W.2d 565 (Tex. Crim. App.)
(Reversed on other grounds; affrimed as to *Batson* issue)

Jackson v. State
772 S.W.2d 459 (Tex. App. - Beaumont, 1989)

Green v. State,
771 S.W.2d 576 (Tex. App. - Hou[14th], 1989)

Mathews v. State,
768 S.W.2d 731 (Tex. Crim. App. 1989)

Wilson v. State,
769 S.W.2d 682 (Tex. App. - Beaumont, 1989)

Crawford v. State,
770 S.W.2d 51 (Tex. App. - Texarkana, 1989)

Sims v. State,
768 S.W.2d 863 (Tex. App. - Texarkana, 1989)

Sosa v. State,
769 S.W.2d 909 (Tex. Crim. App. 1989)

McGee v. State,
774 S.W.2d 229 (Tex. Crim. App. 1989)

York v. State
764 S.W.2d 328 (Tex. App. - Hou[1st], 1988)

Catley v. State
763 S.W.2d 465 (Tex. App. - Hou[14th], 1988)

Castillo v. State,
761 S.W.2d 495 (Tex. App. - Waco, 1988)

Cruz v. State,
762 S.W.2d 624 (Tex. App. - Hou[14th], 1988)

Anderson v. State,
758 S.W.2d 676 (Tex. App. - Ft. Worth, 1988)
(Reversed on other grounds; affrimed as to *Batson* issue)

Jones v. State,
756 S.W.2d 376 (Tex. App. - Hou[14th, 1988)

Hastings v. State,
755 S.W.2d 183 (Tex. App. - San Antonio, 1988)

Ex parte Halburton,
755 S.W.2d 131 (Tex. Crim. App. 1988)

Allen v. State,
753 S.W.2d 792 (Tex. App. - Beaumont, 1988)

Williams v. State,
752 S.W.2d 729 (Tex. App. - Corpus Christi, 1988)

Williams v. State,
773 S.W.2d 525 (Tex. Crim. App. 1988)

Allen v. State
751 S.W.2d 931 (Tex. App. - Hou[1st], 1988)

Singleton v. State,
751 S.W.2d 316 (Tex. App. - Hou[14th], 1988)

Glenn v. State,
754 S.W.2d 290 (Tex. App. - Hou[1st], 1988)

Brown v. State,
750 S.W.2d 340 (Tex. App. - Beaumont, 1988)

Keeton v. Sate,
749 S.W.2d 861 (Tex. Crim. App. 1988)

Stewart v. State,
748 S.W.2d 543 (Tex. App. - Dallas, 1988)

Levy v. State,
749 S.W.2d 176 (Tex. App. - Hou[14th], 1988)

Rice v. State,
746 S.W.2d 356 (Tex. App. - Ft. Worth, 1988)

Agbogun v. State,
756 S.W.2d 1 (Tex. App. - Hou[1st], 1988)

Kemp v. State,
746 S.W.2d 316 (Tex. App. - Hou[1st], 1988)

Mead v. State,
759 S.W.2d 437 (Tex. App. - Ft. Worth, 1988)

Chandler v. State,
744 S.W.2d 341 (Tex. App. - Austin, 1988)

McKinney v. State,
744 S.W.2d 252 (Tex. App. - Waco, 1988)

Ali v. State,
742 S.W.2d 749 (Tex. App. - Dallas, 1987)

DeGrate v. State,
741 S.W.2d 553 (Tex. App. - Ft. Worth, 1987)

Porter v. State,
740 S.W.2d 600 (Tex. App. - Ft. Worth, 1987)

Easter v. State,
740 S.W.2d 107 (Tex. App. - Amarillo, 1987)

Johnson v. State,
740 S.W.2d 868 (Tex. App. - Hou[14th], 1988)

Salazar v. State,
745 S.W.2d 85 (Tex. App. - Ft. Worth, 1987)

Adams v. State,
740 S.W.2d 60 (Tex. App. - Dallas, 1987)

Tompkins v. State,
774 S.W.2d 195 (Tex. Crim. App. 1987)

Rasco v. State,
739 S.W.2d 437 (Tex. App. - Hou[14th], 1987)

Kline v. State,
737 S.W.2d 895 (Tex. App. - Hou[1st], 1987)

Garza v. State,
739 S.W.2d 374 (Tex. App. - Corpus Christi, 1987)

Dewberry v. State,
734 S.W.2d 260 (Tex. App. - Dallas, 1987)

Yarbough v. State,
738 S.W.2d 86 (Tex. App. - Dallas, 1987)

Smith v. State,
734 S.W.2d 694 (Tex. App. - Hou[1st], 1987)

Grady v. State,
730 S.W.2d 191 (Tex. App. - Dallas, 1987)

Allen v. State,
726 S.W.2d 636 (Tex. App. - Eastland, 1987)

Townsend v. State,
730 S.W.2d 24 (Tex. App. - Texarkana, 1987)

Price v. State,
726 S.W.2d 611 (Tex. App. - Hou[14th], 1987

Sanders v. State,
727 S.W.2d 674 (Tex. App. - Texarkana, 1987)

Catley v. State,
726 S.W.2d 595 (Tex. App. - Hou[14th], 1987)

May v. State,
738 S.W.2d 261 (Tex. Crim. App. 1987)

Rogers v. State,
725 S.W.2d 477 (Tex. App. -Hou[14th], 1987)

Chambers v. State,
724 S.W.2d 440 (Tex. App. - Hou[14th], 1987)

Modden v. State,
721 S.W.2d 859 (Tex. Crim. App. 1986)

Allen v. State,
722 S.W.2d 514 (Tex. App. - Beaumont, 1986)

Rijo v. State,
721 S.W.2d 562 (Tex. App. - Amarillo, 1986)

Hardy v. State,
722 S.W.2d 164 (Tex. App. - Hou[14th] 1986)

Marks v. State,
721 S.W.2d 401 (Tex. App. - Beaumont, 1986)

APPENDIX C

TEX. R. APP. PRO. 90

Rule 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) Signing of Opinions...

(c) Standards for Publication. an opinion by the court of appeals shall be published only if, in the judgment of the majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies and existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) Concurring and dissenting Opinions...

(e) Determining to Publish. A majority of the justicies participating in the decision of a case shall determine, prior to the time it is issued, whether an o-pinion meets the ctiteria for publication, and if it does not meet the criteria for publication, the opinion shall be distributerd only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish".

(f) Rehearing...

(g) Action of the Court En Banc...

(h) Order of the Supreme Court...

(i) Unpublished Opinions. Unpublished opinions shall not be cited as authority by counsel or a court.

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